the trust, at any time before the formation of the Andrews Institute the Smithsonian Institution could have obtained the accruing surplus income, *Manice* v. *Manice*, supra 385, but this interest was divested by the happening of the contingency which created a new person "presumptively entitled to the next eventual estate." *Cook* v. *Lowry*, supra. This was not the line of reasoning followed by the court, which seemed to hold that the St. Andrews Institute was presumptively entitled before it was formed. This is clearly unsound as it presents the anomaly of the accumulations vesting in a person not in esse. It should be noted that if the trust had ceased *ipso facto* upon the formation of the Andrews Institute, the latter would not then have been presumptively entitled, and the right of the Smithsonian Institution would not have been divested.

SUIT AT LAW UPON A COVENANT OF OPTION INVALID UNDER THE RULE AGAINST PERPETUITIES.—In the case of *London & The S. W. Railway* v. *Gomm* (1882) L. R. 20 Ch. Div. 562, it was held, overruling *Birmingham* v. *Cartwright* (1879) L. R. 11 Ch. Div. 421, and followed in *Woodall* v. *Clifton* (1904) L. R. 2 Ch. Div. 257, that a covenant of option to repurchase, which right might not be exercised within the period allowed by the Rule against Perpetuities, was subject to that rule and void for remoteness. Specific performance of such a covenant was therefore denied. The question then arises whether a suit at law upon such a covenant is maintainable. A recent decision in England has held that it is. *Worthing Corporation* v. *Heather* (1906) L. R. 2 Ch. Div. 532. There specific performance of an option to purchase was refused upon the authority of the preceding cases; but damages were awarded for breach of the contract at law. Curiously enough, this is the first time the precise question has ever arisen in a case; but T. Cyprian Williams, Esq., in an article in 42 Sol. Jour. 650 (1898), seemingly anticipating the point, came to an opposite conclusion. It is submitted, however, that the view taken in the principal case is sound. It is clear that the ground for refusing specific performance is that when the grantee gives notice of his election to exercise the option and call for a conveyance he will be regarded in equity as having an equitable interest in the land; and if he may exercise that option at a time far remote, then his contract right to exercise it will ripen into an equitable interest at such remote time, which is obviously in contravention of the Rule against Perpetuities. *London & S. W. Ry.* v. *Gomm*, supra; *Woodall* v. *Clifton*, supra. But it is only in equity that such an agreement can create an interest in property; and it is only where a future interest in property is created that the rule applies. At law there is merely a personal contract. The Rule against Perpetuities is not, therefore, directly applicable to a suit at law upon such a contract. But it may be that on other grounds the contract even at law tends to contravene public policy. Unless this is the case, an action for damages should be maintainable. There are three conceivable reasons why the courts might hold such an agreement unenforcible at law. First, to allow a suit at law upon the contract may offend the spirit of the Rule against Perpetuities. Second, it may stimulate the performance of an act which is contrary to some definite rule of public policy. Third, the contract itself may be obnoxious to the general policy of the law against restraint

on alienation. This must not be confused with that policy of the Rule against Perpetuities which merely concerns itself with the tying up of estates beyond a certain time limit in such a way that an absolute conveyance of the fee can not be made.

As to the first reason a brief consideration of the object of the Rule against Perpetuities will show that its spirit is not offended by the principal case. It is now regarded as the true theory of the rule that "The wish to keep land or personal property in commerce is not the sole *raison d'etre* of the Rule against Perpetuities. This reason certainly has no force in the case of a trust where the trustees have full power to change investments, or to a case where there is a person in existence who can transfer or release a remote future interest, and yet in both these cases the rule is applied. Is it not another reason that when the ownership in property is in danger of being lost by a future contingency, the property is not likely to be used with that energy and interest with which it would be used if it were a man's own?" Gray, Perpetuities, 2nd Ed. §603 f. "The validity or non-validity of an interest does not depend solely on whether the alienability of the property is affected, but also on whether the interest is upon a remote condition." 7 H. L. R. 410. See 6 H. L. R. 195. These views, although inapplicable to the New York version of the Rule, see 1 COLUMBIA LAW REVIEW 224, find notable support in the cases of *London & S. W.* Ry. v. *Gomm*, supra; *In re Hargreaves* (1889) L. R. 43 Ch. D. 401; and *Winsor* v. *Mills* (1892) 157 Mass. 362; see 14 LAW QUARTERLY REVIEW, 240, note. Assuming the soundness of this analysis, can it be said that to allow a suit for damages upon this contract is repugnant to the spirit of the Rule? It will not cause contingent land claims of uncertain value to arise in the future, and thus embarrass the holders of the property. It will merely compel them to pay for breaking their contract. Nor is the spirit of the provisions against inalienability infringed in the slightest degree. The parties may at any time, by joining in the conveyance, transfer an absolute fee. Even specific performance of the contract would not be wrong from that point of view alone, leaving aside the question of remoteness.

The second point of attack upon the principal case seems to underlie Mr. Williams' contention. He refers to *Jervis* v. *Bruton* (1691) 2 Vern. 251. In *Poole's Case* (1609) Moore 809, followed in *Jervis* v. *Bruton*, specific performance was asked of a bond that a tenant in tail should not suffer a recovery; but the defendant not only successfully opposed specific performance, but even had the bond cancelled, thus effectually preventing a suit at law upon it. In two other cases, however, *Freeman* v. *Freeman* (1691) 2 Vern. 233, and *Collins* v. *Plummer*, (1708) 2 Vern. 635, similar bonds were held good at law. See Co. Lit, 206 b. Mr. Williams refers also to the cases where contracts in restraint of marriage are held void and unenforcible at law. But it is believed that both these classes of cases rest upon a different basis from that of the principal case. There was a very good reason for refusing to allow suits at law on covenants in restraint of marriage; for otherwise a strong pressure would be exerted upon the covenantor not to marry, a result which was regarded with marked disapproval by the law. *White* v. *Equitable, Etc. Union* (1884) 76 Ala. 251. Likewise, to bind a tenant in tail not to suffer a recovery

was considered as stripping him of one of the essential attributes of a fee tail, namely, the right to bar the entail. See *Corbet's Case* (1598) 1 Co. Rep. 836; *Mildmay's Case* (1605) 6 Co. Rep. 40 a. Back of this was the clear policy of the courts, through which the Statute De Donis was effectually nullified by Taltarum's case (1472) 12 Edw. IV, 19, Pl. 25, encouraging the practice of barring entails. Gray, Perp., 2nd Ed., Secs. 140 et seq; Digby, Hist. Real Prop. Ch V, § 2. Accordingly, any means of forcing tenants in tail to forego this privilege was against public policy; and it is only surprising that all of the cases in Vernon were not decided like *Poole's Case*. See Gray, Restraints on Alienation, § 77. Thus it is evident that in these two classes of cases performance of the contract contravened a well defined rule of policy. But this is not true of the principal case; for, as emphasized by Warington, J., if the covenantor, actuated by dread of a law suit, should perform his covenant the result would be a simple conveyance of the land.

Finally, there is no reason to avoid the contract as obnoxious to the general policy of the law against restraints on alienation, irrespective of the Rule against Perpetuities. The legitimacy of options as a feature of commercial law is too well recognized to attack them now on that score. It is evident, moreover, that the ultimate intent of the parties to an option is not to restrain alienation, but to transfer the fee to the holder of the option. The analogy of conditions or covenants in grants of a fee made for the purpose of restraining alienation [which are held void, *In Re Rosher* (1884) L. R. 26, Ch. Div. 801; *Prey* v. *Stanley* (1895) 110 Cal. 423, whether they fall within the Rule against Perpetuities or not, *Mandelbaum* v. *McDonnell* (1874), 29 Mich. 78,] has therefore no application. Upon every theory the principal case is sound.

REMEDIES AND MEASURE OF DAMAGES IN EMPLOYMENT CONTRACTS.—Three remedies were at one time allowed in England to a servant wrongfully discharged. 2 Smith's Lead. Cas. 41. The first was to wait until the termination of the period for which he was hired and then sue in quasi-contract for the wages constructively earned. *Gandall* v. *Pontigny* (1816) 4 Camp. 375; *Collins* v. *Price* (1828) 5 Bing. 132. This was followed by some jurisdictions in the United States, *Huntington* v. *R. R. Co.* (N. Y. 1868) 7 Am. Law Reg. n. s. 143; *Strauss* v. *Meertief* (1879) 64 Ala. 299; *Booge* v. *Pac. R. R.* (1862) 33 Mo. 212, but has now been repudiated in England, *Fewings* v. *Tisdal* (1847) 1 Exch. 295; *Goodman* v. *Pocock* (1850) 69 Eng. Com. Law. Rep. 574, and in New York. *Howard* v. *Daly* (1875) 61 N. Y. 362. The second was to "rescind" and sue immediately in quasi-contract for the wages actually earned before dismissal, and this is generally allowed at present both in England and the United States. *Archard* v. *Harner* (1828) 3 C. & P. 349; *Planchè* v. *Colburn* (1831) 8 Bing. 14; *Chicago* v. *Tilley* (1880) 103 U. S. 146; but see 7 COLUMBIA LAW REVIEW 123. The third remedy, and the one now usually employed, Smith, Master and Servant, 5th Ed., 158, was an action for breach of the express contract, the breach being not the failure to pay the stipulated wages—for they could not be said to be properly earned—but the failure to allow the servant to earn them; *Beckham* v. *Drake* (1849) 2 H. of L. Cas. 578, 603; *Emmens* v. *Elderton* (1853) 4 H. of